

**Letter of Findings Number: 04-20130228**  
**Sales Tax**  
**For Tax Years 2010-11**

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**ISSUES**

**I. Use Tax—Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of use tax.

**II. Sales Tax—Imposition.**

**Authority:** IC § 6-1.1-1-15; IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of sales tax.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business filing as an S corporation. Taxpayer operates two convenience stores that are attached to gas stations. Taxpayer is responsible for the gasoline sales at location one, but a separate gasoline company is responsible for the gasoline sales at location two. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records. The Department determined that Taxpayer's records were inadequate. Taxpayer did not have daily cash register Z-tapes, original sales records, expense reports, and/or monthly sales recaps.

As a result of the Department's audit, the Department issued proposed assessments of additional sales and use tax based on the "best information available." The Department determined that Taxpayer had not collected and/or reported the proper amount of sales tax on its sales of diesel fuel, gasoline, and convenience store items. The Department also determined that Taxpayer had not reported the correct amount of use tax. The Department issued proposed assessments for the additional sales tax, use tax, interest, and ten percent negligence penalties for the 2010 and 2011 tax years. Taxpayer protested. An administrative hearing was held, and this Letter of Finding results. Further facts will be supplied as required.

**I. Use Tax—Imposition.**

**DISCUSSION**

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). In general, all purchases of tangible personal property are subject to sales and/or use tax. An exemption from use tax is granted for transactions where sales tax was paid at the time of the purchase, pursuant to IC § 6-2.5-3-4. In certain circumstances, additional enumerated exemptions from sales and/or use tax are available.

During the audit, the Department requested original purchase invoices and other documentation to demonstrate the nature of the capital asset purchase transactions which were reported on Taxpayer's depreciation schedule that was filed with its federal income tax return as "Equipment." Taxpayer was unable to provide the invoices that support the transactions listed on the depreciation schedule. Since the auditor was unable to verify that Taxpayer paid sales tax at the time of the transactions, use tax was assessed on the purchases.

Taxpayer maintains that use tax is being imposed on "tangible assets" that were not purchased as part of a "retail transaction," but were purchased as part of a "real property purchase agreement." Taxpayer states that this amount was paid as part of the "real property purchase agreement" and represented equipment that was already "pre-built" in the building. During the protest, Taxpayer submitted a "purchase agreement," its federal income tax return, and the federal income tax return depreciation schedule to demonstrate the nature of this transaction. The "purchase agreement" provides that "the following items [of tangible property] are located on the Real Estate and owned by Seller that will be part of the transaction." The building was valued at \$50,000 and the items of tangible property—i.e., the "Equipment" that taxpayer listed on the depreciation schedule—were valued at \$250,000.

Based upon this additional documentation, Taxpayer has presented sufficient documentation to demonstrate that the transaction in question did not represent the transfer of tangible personal property in a retail transaction. See IC § 6-1.1-1-15 (providing that "'Real property' means land located within this state [and] a building or fixture situated on land located within this state . . .") Therefore, Taxpayer has provided sufficient evidence to establish that the transaction in question was not subject to sales and use tax.

#### FINDING

Taxpayer's protest to the imposition of use tax on \$250,000 of "Equipment" purchased as part of a "real property purchase agreement" is sustained.

#### II. Sales Tax—Imposition.

##### DISCUSSION

As noted previously, all tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

During the audit, the Department requested original sales records, invoices, expense reports, and monthly sales recaps covering the Tax Years. Taxpayer did not provide any of those items requested. Without more complete or reliable original records, the auditor proceeded to develop the audit report based upon the "best information available." IC § 6-8.1-5-1(b) provides that "[i]f the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available."

It should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4. In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times."

The Department assessed Taxpayer sales tax. IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in [IC 6-2.5-4-1](#) . . . or that is described in any other section of [IC 6-2.5-4](#)." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." The retail merchant collects "the tax as agent for the state." IC § 6-2.5-2-1(b). "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." [45 IAC 2.2-8-12\(b\)](#).

Accordingly, Taxpayer, as a retail merchant, has a duty to collect and remit sales tax on its sales of tangible personal property. When a retail merchant fails to collect and hold the taxes in trust for the state, the retail merchant is personally liable for the sales tax, interest, and penalties due to the state for those sales. After reviewing the scanty records Taxpayer made available, the Department determined that Taxpayer had not collected and remitted the proper amount of sales tax for these years. Based on the information available, the Department made assessments of sales tax based upon the additional sales of diesel fuel, gasoline, and convenience store items.

Taxpayer protests the imposition of sales tax related to these additional sales of diesel, gasoline, and convenience store items.

##### A. Convenient Store Food Items: Exempt Purchases.

Since original sales transaction documentation was not available, the auditor compared the Taxpayer reported cost of goods sold of its federal income tax return to the industry average for this type of business on BizStats.com to derive a gross receipts amount. Then, the auditor made an adjustment for sales of exempt food items. Based upon these determined amounts, the Department determined that Taxpayer had underreported its taxable sales for the 2010 and 2011 tax years. The Department used these determined amounts to make adjustments to Taxpayer's reported sales for the 2010 and 2011 tax years.

During the hearing, Taxpayer presented purchase documentation, bank statements, and its federal tax returns. Taxpayer maintains that this documentation demonstrates that the amounts that the Department used from Taxpayer's cost of goods sold reported on Taxpayer's federal income tax return included the gasoline purchases as well as the convenience store purchases. Since a separate adjustment was made for the gasoline sales, these amounts should not be included in a calculation for the adjustment of the convenience store sales. Based upon the documentation presented, it appears that the adjustments made to Taxpayer's reported taxable sales should be re-evaluated. Therefore, the audit division is requested to review the audit report, to review the accompanying documentation, and to make whatever adjustments it deems warranted.

Accordingly, Taxpayer's protest will be sustained to the extent that the supplemental audit of the additional documentation results in the audit division making an adjustment. However, Taxpayer's protest is denied to the extent that the supplemental audit of the additional documentation does not result in the audit division making an adjustment.

##### B. Gasoline: Additional Purchase Records.

Since original sales transaction documentation was not available, the auditor reviewed the purchase documentation that Taxpayer had available at the time of the audit. Based upon an analysis of Taxpayer's

purchase documentation compared to its reported sales transactions, the Department determined that Taxpayer had underreported its gasoline sales transactions.

During the hearing, Taxpayer presented additional purchase documentation for its gasoline sales. Taxpayer maintains that analysis of the complete purchase documentation results in a much lower assessment because the Department analysis did not subtract the excise tax that was paid on the invoices and did not properly account for the pre-paid tax. Taxpayer also states that the analysis did not properly credit the amounts that Taxpayer reported on the Form ST-103MPs each month. Based upon the documentation presented, it appears that the adjustments made to Taxpayer's reported gasoline sales should be re-evaluated. Therefore, the audit division is requested to review the audit report, to review the accompanying documentation, and to make whatever adjustments it deems warranted.

Accordingly, Taxpayer's protest will be sustained to the extent that the supplemental audit of the additional documentation results in the audit division making an adjustment. However, Taxpayer's protest is denied to the extent that the supplemental audit of the additional documentation does not result in the audit division making an adjustment.

#### **C. Diesel: Additional Purchase Records.**

Since original sales transaction documentation was not available, the auditor reviewed the purchase documentation that Taxpayer had available at the time of the audit. Based upon an analysis of Taxpayer's purchase documentation compared to its reported sales transactions, the Department determined that Taxpayer had underreported its diesel sales transactions.

During the hearing, Taxpayer presented additional purchase documentation for its diesel sales. Taxpayer maintains that analysis of the complete purchase documentation results in a much lower assessment because the Department analysis uses more gallons than were actually purchased and that the excise tax paid on the purchase invoices was not subtracted. Taxpayer also states that the analysis did not properly credit the amounts that Taxpayer reported on the Form ST-103MPs each month. Based upon the documentation presented, it appears that the adjustments made to Taxpayer's reported diesel sales should be re-evaluated. Therefore, the audit division is requested to review the audit report, to review the accompanying documentation, and to make whatever adjustments it deems warranted.

Accordingly, Taxpayer's protest will be sustained to the extent that the supplemental audit of the additional documentation results in the audit division making an adjustment. However, Taxpayer's protest is denied to the extent that the supplemental audit of the additional documentation does not result in the audit division making an adjustment.

### **FINDING**

Taxpayer's protest of the Department's adjustments to its reported convenience store taxable sales is sustained subject to the findings of a supplemental audit, as discussed in subpart A. Taxpayer's protest of the Department's adjustments to its reported gasoline sales is sustained subject to the findings of a supplemental audit, as discussed in subpart B. Taxpayer's protest of the Department's adjustments to its reported diesel sales is sustained subject to the findings of a supplemental audit, as discussed in subpart C.

### **SUMMARY**

Taxpayer's protest to the imposition of use tax on \$250,000 of "Equipment" purchased as part of a "real property purchase agreement" is sustained, as discussed in Issue I. Taxpayer's protest of the Department's adjustments to its reported convenience store taxable sales is sustained subject to the findings of a supplemental audit, as discussed in Issue II(A). Taxpayer's protest of the Department's adjustments to its reported gasoline sales is sustained subject to the findings of a supplemental audit, as discussed in Issue II(B). Taxpayer's protest of the Department's adjustments to its reported diesel sales is sustained subject to the findings of a supplemental audit, as discussed in Issue II(C).

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